Hameed Jagubar bin Syed Ahmad v Pacific & Orient Insurance Co Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(NCVC)(A)-302–02 OF 2016
LIM YEE LAN, BADARIAH SAHAMID AND HARMINDAR SINGH JJCA
20 JUNE 2017

Insurance — Construction of policy — Duration of cover — Insurance policy issued on same day, after accident occurred — Determination of effective date of policy — Whether there was insurance coverage at the time of accident — Whether policy unenforceable or void — Whether High Court erred in relying on the doctrine of privity of contract — Road Transport Act 1987 s 96(1) & (3)

This was an appeal against the decision of the High Court. In the High Court, one Khor Teim Wan ('Khor') was involved in a road accident with the appellant who was riding a motorcycle. Shortly after the accident, Khor applied for insurance cover for motorcycle PHS 5512. An insurance policy was issued by the Pacific & Orient Insurance Co Bhd ('Pacific & Orient') on 27 October 2011 at 2.16pm. Pacific & Orient filed an originating summons seeking a declaration that the insurance policy certificate issued by them to Khor was void and unenforceable. The appellant who sustained injuries, was the intervener at the High Court. At the originating summons hearing, the appellant relied on the grounds of fraud on the part of Khor and that a serious and contentious allegation such as fraud could not be disposed of by way of affidavit. The originating summons was then allowed with costs of RM30,000 to be paid by the appellant to Pacific & Orient. The High Court noted that there was no insurance cover as at 1.30am on 27 October 2011 for motorcycle PHS 5512. Relying on case law and the doctrine of privity of contract, the High Court held that the appellant could not be allowed to question the acceptance or rejection of the risk under the insurance contract in respect of motorcycle PHS 5512. The High Court also held that the insured had the intention to defraud the insurer with regard to issuing a policy covering the time of the accident. Aggrieved with this decision, the appellant filed this appeal. The primary issue to be determined was whether a policy of insurance, which was not in existence at the time of the accident, and issued by the insurer only after the accident but by its terms covered the date of the accident, was unenforceable or void under s 96(3) of the Road Transport Act 1987 ('the RTA'), ie: what was the effective date of the period of insurance.

Held, allowing the appeal and setting aside the orders of the High Court with costs to the appellant here and below:

(1) Section 96(3) of the RTA quite clearly provided for a right for the injured third party to intervene in any such proceeding and to defend his or her right. It was not a simply a matter between the insurer and the insured as implied by the learned judicial commissioner. A declaration obtained under s 96(3) of the RTA amounted to a complete defence against any recovery proceedings by the injured third party under s 96(1) of the RTA. Therefore, it was only fair and logical that the injured third party should not only be added as party to the insurer's declaration proceeding but also be given every opportunity to defend his or her rights to opposed the application by an insurer without qualification. It was misconceived to cite privity of contract as a ground to deprive a third party of his right to defend his or her rights as this right was provided by the statute (see paras 11 & 13).

(2) The court agreed that the policy became effective when the date came into existence at midnight and not when the policy was issued. The reason being, the schedule to the insurance policy on the instant case stated the time and date of the policy as '27-10-2011 2.16pm' and the period of the insurance was stated as 'from 27-10-2011 until midnight of 26-10-2012'. Only the date of commencement of cover was mentioned without specifying any particular time of commencement. This was purely a construction of the relevant clauses in the policy. By terms of its own contract, the policy had become effective retrospectively in the sense that the coverage began at midnight on 27 October 2011 and therefore, included the period when the accident occurred (see paras 27–28).

(3) A policy of insurance is valid and effective under s 96(1) of the RTA even though at the time of the accident there was no contract of insurance in existence, and that the policy was only issued subsequently to cover the time of the accident (see para 35).

(4) Although the insured was guilty of breach of utmost good faith, the appellant was an innocent third party. Motor insurance was compulsory by law and Parliament's intention was to provide compensation by insurance companies especially innocent and blameless third parties who suffered injury and damage. It was a statutory remedy and there ought to have been some assurance of payment otherwise the whole purpose of such an insurance scheme would seem illusory (see para 38).

(5) The order of the High Court in effectively repudiating liability in respect of all claims arising out of the accident that occurred on 27 October 2011 could not be sustained. The insurer was the 'insurer concerned' under the domestic Motor Insurers' Bureau of Malaysia ('MIB') agreement and was therefore still liable to third parties, including the appellant, for any claims arising out of the said road accident. By entering the MIB agreement, the insurer had effectively waived their right to seek for such

orders from the court under s 96(3) of the RTA. The remedy for the insurer then was to seek recovery against the insured for any such monies paid out by them (see para 50).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi. Di Mahkamah Tinggi, seorang bernama Khor Teim Wan ('Khor') telah terlibat dalam kemalangan jalan raya dengan perayu yang menunggang motorsikal. Sejurus selepas kemalangan, Khor memohon untuk perlindungan insurans untuk motorsikal PHS 5512. Satu polisi insurans telah dikeluarkan oleh Pacific & Orient Insurance Co Bhd ('Pacific & Orient') pada 27 Oktober 2011 pada 2.16 petang. Pacific & Orient memfailkan saman pemula memohon satu deklarasi bahawa sijil polisi insurans dikeluarkan oleh mereka kepada Khor adalah tidak sah dan tidak boleh laksana. Perayu yang mengalami kecederaan, adalah pencelah di Mahkamah Tinggi. Semasa perbicaraan saman pemula, perayu bergantung atas alasan fraud oleh pihak Khor dan bahawa tuduhan serius dan bertikaian seperti fraud tidak boleh dilepaskan melalui cara afidavit. Saman pemula tersebut kemudiannya dibenarkan dengan kos RM30,000 untuk dibayar oleh perayu kepada Pacific & Orient. Mahkamah Tinggi menyatakan bahawa tiada perlindungan insurans pada pukul 1.30 pagi 27 Oktober 2011 untuk motorsikal PHS 5512. Mahkamah Tinggi bergantung kepada kes undang-undang dan doktrin priviti kontrak, memutuskan bahawa perayu tidak dibenarkan untuk mempersoalkan penerimaan atau penolakan risiko di bawah kontrak insurans berkaitan motorsikal PHS 5512. Mahkamah Tinggi juga memutuskan bahawa pengambil insurans mempunyai niat untuk melakukan fraud terhadap syarikat insurans berhubung dengan pengeluaran polisi yang meliputi masa kemalangan itu. Terkilan dengan keputusan ini, perayu memfailkan rayuan ini. Isu utama untuk ditentukan adalah sama ada polisi insurans, yang tidak wujud pada masa kemalangan itu, dan dikeluarkan oleh syarikat insurans hanya selepas kemalangan itu tetapi syarat-syaratnya meliputi tarikh kemalangan itu, telah tidak boleh dikuatkuasakan atau tidak sah di bawah s 96(3) Akta Pengangkutan Jalan 1987 ('APJ'), iaitu: apakah tarikh berkuat kuasa tempoh insurans.

Diputuskan, membenarkan rayuan dan mengetepikan perintah Mahkamah Tinggi dengan kos untuk perayu di mahkamah ini dan mahkamah bawahan:

(1) Seksyen 13 APJ jelas memperuntukkan hak untuk pihak ketiga yang cedera untuk campur tangan dalam apa-apa prosiding sebegitu dan untuk membela hak mereka. Ia bukanlah hanya perkara antara syarikat insurans dan pengambil insurans seperti yang dinyatakan oleh pesuruhjaya kehakiman yang bijaksana. Satu deklarasi diperolehi di bawah s 96(3) APJ terjumlah kepada satu pembelaan lengkap terhadap apa-apa prosiding pemulihan oleh pihak ketiga yang cedera di bawah s 96(1) APJ. Oleh itu, ia adalah adil dan logik bahawa pihak ketiga yang

cedera bukan sahaja ditambah sebagai pihak kepada prosiding deklarasi syarikat insurans tetapi juga diberi peluang untuk membela hak mereka untuk menentang permohonan oleh syarikat insurans tanpa kelayakan. Adalah salah tanggap untuk merujuk priviti kontrak sebagai alasan untuk menafikan pihak ketiga haknya untuk membela haknya kerana hak ini diperuntukkan oleh undang-undang (lihat perenggan 11 & 13).

(2) Mahkamah bersetuju bahawa polisi berkuat kuasa apabila tarikh bermula pada tengah malam dan bukan semasa polisi dikeluarkan. Sebabnya, jadual kepada polisi insurans atas kes ini menyatakan masa dan tarikh polisi sebagai '27-10-2011 2.16pm' dan tempoh insurans dinyatakan sebagai 'from 27-10-2011 until midnight of 26-10-2012'. Hanya tarikh permulaan perlindungan disebut tanpa menyatakan apa-apa masa permulaan tertentu. Ini adalah semata-mata pentafsiran klausa yang berkaitan di dalam polisi. Dengan syarat-syarat kontrak sendiri, polisi telah berkuat kuasa secara retrospektif dalam erti kata bahawa liputan bermula pada tengah malam pada 27 Oktober 2011 dan oleh itu, termasuk tempoh apabila kemalangan itu berlaku (lihat perenggan 27–28).

(3) Polisi insurans adalah sah dan berkuat kuasa di bawah s 96(1) APJ walaupun pada waktu kemalangan tiada kontrak insurans wujud, dan bahawa polisi itu hanyalah dikeluarkan kemudiannya untuk melindungi waktu kemalangan tersebut (lihat perenggan 35).

(4) Walaupun pengambil insurans adalah bersalah atas pelanggaran penuh percaya mutlak, perayu adalah pihak ketiga yang tidak bersalah. Insurans motor adalah wajib oleh undang-undang dan niat Parlimen adalah untuk memberikan pampasan oleh syarikat insurans terutama pihak ketiga yang tidak bersalah yang mengalami kecederaan dan kerosakan. Ia adalah satu remedi undang-undang dan sepatutnya terdapat jaminan pembayaran jika tidak, keseluruhan tujuan skim insurans sedemikian akan kelihatan seperti ilusi (lihat perenggan 38).

(5) Perintah Mahkamah Tinggi dengan berkesan menafikan liabiliti berkenaan dengan semua tuntutan yang berbangkit akibat kemalangan yang berlaku pada 27 Oktober 2011 tidak dapat dikekalkan. Syarikat insurans adalah 'insurer concerned' di bawah perjanjian Biro Penanggung Insurans Motor Malaysia ('MIB') dan oleh itu masih bertanggungjawab kepada pihak ketiga, termasuk perayu, untuk apa-apa tuntutan yang berbangkit daripada kemalangan jalan raya tersebut. Dengan memasuki perjanjian MIB, syarikat insurans itu dengan berkesan mengetepikan hak mereka untuk mendapatkan perintah daripada mahkamah di bawah s 96(3) APJ. Remedi untuk syarikat insurans adalah untuk mencari pemulihan terhadap pengambil insurans bagi apa-apa wang yang dibayarkan oleh mereka (lihat perenggan 50).]

Notes

For a case on duration of cover, see 8(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 63.

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 1 AMR 909, FC (refd)
Cartwright v MacCormack (Trafalgar Insurance Co Ltd Third Parties) [1963] 1 All ER 11, CA (refd)
Etiqa Takaful Berhad v Rorki Dusong & Ors [2016] MLJU 257; [2016] 2 AMCR 71, HC (refd)
Jaikrishandas vs Chiruthai Ammal and Anr 1 (1985) ACC 81; AIR [1984] Mad 321, HC (refd)
Kepong Prospecting Ltd v Schmidt [1962] 1 MLJ 375, CA (refd)
Maya Devi and Ors v Hoob Raj and Ors I (1987) ACC 33, HC (refd)
Medical Defence Union Ltd v Department of Trade [1980] Ch 82, Ch D (refd)
Merchants' and Manufacturers, Insurance Co Ltd v Hunt and Others [1941] 1 All ER 123, CA (refd)
Mohd Faiz bin Zulkifli & Anor v Etiqa Takaful Berhad [2016] MLJU 254; [2016] 5 CLJ 679, HC (refd)
Mohd Salleh Kasim v Taisho Marine & Fire Insurance Co Ltd & Anor [1998] MLJU 665; [1999] 5 CLJ 302, HC (refd)
Motor & General Insurance Co Ltd and Dorothy Cox and Another [1990] 1 WLR 1443, PC (refd)
National Insurance Co Ltd v Dakhi and Ors [1990] ACJ 827, HC (refd)
New India Assurance Co Ltd vs Ram Dayal and Ors 1990 SCC (2) 680, SC (refd)
Oriental Insurance Co Ltd v Shri Prakash and Ors [1993] ACJ 1085, HC (refd)
Pacific & Orient Insurance Co Bhd (formerly known as Pacific & Orient Insurance Co Sdn Bhd) v Motor Insurers' Bureau of Singapore [2013] 1 SLR 341; [2012] SGHC 202, HC (refd)
Pacific Orient Insurance Co Bhd v Rosli bin Samsuddin and Ors (OS No 24–970 of 2011) (unreported), HC (refd)
Rozanes v Bowen (1928) 32 Lloyd's Rep 98, CA (refd)
V Srinivasan v Rajalakshmi AIR 1975 Mad 263, HC (refd)

Legislation referred to

Insurance Act 1996 (repealed by Financial Services Act 2013) s 150(1)
Motor Vehicles Insurance Act [BB] ss 4(7), 9(1)
Road Transport Act 1987 ss 89, 91(4), 96, 96(1), (3), (4), (5), (6), Part IV
Road Traffic Act 1934 [UK] s 10(3)

Appeal from: Originating Summons No 24NCVC-1310–12 of 2013 (High Court, Pulau Pinang)

Dev Kumar (Kumar & Co) for the appellant.
R Kamalanathan (Vinod Kamalanathan with him) (Vinod Kamalanathan & Assoc) for the respondent.

Harmindar Singh JCA (delivering judgment of the court):

[1] This appeal from the Pulau Pinang High Court is primarily concerned with the issue of whether a policy of insurance, which was not in existence at the time of accident, and issued by the insurer only after the accident, but by its terms covers the date of the accident, is unenforceable or void under s 96(3) of the Road Transport Act 1987 ('the RTA'). In other words, the question which confronted us was: what was the effective date of the period of insurance?

[2] The plaintiff in the High Court, Pacific & Orient Insurance Co Bhd, had filed the originating summons ('OS') seeking for a declaration that the insurance policy certificate issued by the plaintiff to the defendant (Khor Teik Wan) to cover motorcycle registration No PHS 5512 was void and unenforceable. The intervener (Hameed Jagubar bin Syed Ahmad) had brought a personal injury claim at the Georgetown Sessions Court against the defendant as a result of injuries suffered in a motor vehicle accident that occurred on 27 October 2011.

[3] Despite the objections by the intervener, the declarations sought by the plaintiff were allowed by the High Court on 22 January 2016. By this order, the plaintiff had effectively repudiated liability in respect of all claims arising out of the accident that occurred on the 27 October 2011. Aggrieved with this decision, the intervener filed this appeal.

[4] At the hearing of the appeal on 9 January 2017, and after having read the written submissions as well as hearing oral arguments on the issues raised, we indicated to the parties that we would deliver our decision on a date to be informed. Having deliberated on the issues raised, this is now our unanimous decision which will form the judgment of the court. For convenience, the parties will be referred to as they were in the High Court.

THE FACTUAL BACKGROUND

[5] The relevant facts leading to the filing of the OS can be stated as follows. The defendant was the registered owner of motorcycle registration No PHS 5512. On 27 October 2011 at 1.30am, the defendant was involved in road accident with the intervener who was riding motorcycle registration No PDR

5534 at the time. Shortly after the accident, the defendant applied for insurance cover for motorcycle PHS 5512. An insurance policy was issued by the plaintiff on 27 October 2011 at 2.16pm.

[6] Meanwhile, the intervener, who had sustained injuries in the said road accident, filed Suit No 53–26–01 of 2012 at the Georgetown Sessions Court claiming damages against the defendant. At the trial in the sessions court, it came to light that the accident had occurred at 1.30am on 27 October 2011 and not at 2pm as stated in the defendant's earlier police report. The defendant's subsequent police report stated the time as 1.30am. The plaintiff then filed the present OS to declare the policy void and unenforceable. The trial at the sessions court was stayed pending the hearing of the OS.

[7] At the OS hearing, the intervener successfully applied to be added as an intervener. One of the grounds relied upon by the plaintiff was that there was fraud on the part of the defendant. The intervener contended that a serious and contentious allegation such as fraud cannot be disposed of by way of affidavits. The burden would be on the plaintiff to establish fraud and the intervener would have the opportunity to cross-examine the plaintiff's witnesses.

DECISION OF THE HIGH COURT

[8] In his decision to allow the OS, the learned judicial commissioner ('JC') noted that there was no insurance cover as at 1.30am on 27 October 2011 for motorcycle PHS 5512. Relying on the cases of *Kepong Prospecting Ltd v Schmidt* [1962] 1 MLJ 375 and *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 1 AMR 909, and the doctrine of privity of contract, the learned JC held that the intervener could not be allowed to question the acceptance or rejection of the risk under the insurance contract in respect of motorcycle PHS 5512.

[9] The learned JC also noted that as the defendant had failed to file a single affidavit to rebut the plaintiff's allegations, it can be concluded that the defendant 'had intended to defraud the plaintiff that there was insurance cover in regards to the accident which occurred on 27.10.2011 at 1.30 am'. The OS was then allowed with costs of RM3,000 to be paid by the intervener to the plaintiff.

THE INSTANT APPEAL

[10] The declarations sought in the OS, it must be noted, were based on the insurer's duty to satisfy judgments against persons insured in respect of third party risks and their right to avoid liability under s 96 of the RTA which provides:

96(1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms to the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgement any sum payable in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements.

(2) No sum shall be payable by an insurer under subsection (1) —

(a) in respect of any judgement, unless before or within seven days after the commencement of the proceedings in which the judgement was given, the insurer had notice of the proceedings;

(b) in respect of any judgement, so long as execution is stayed pending an appeal; or

(c) in connection with any liability, if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability the policy was cancelled by mutual consent or by virtue of any provision contained therein and either —

(i) before the happening of the said event the certificate was surrendered to the insurer or the person to whom the certificate was delivered made a statutory declaration stating that the certificate had been lost or destroyed;

(ii) after the happening of the said event, but expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer or the person to whom the certificate was delivered made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the said event, but within the said period of fourteen days, the insurer has commenced proceedings under this Part in respect of the failure to surrender the certificate.

(3) No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not become entitled to the benefit of this subsection as respects any judgement obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

(Subsections (4), (5) and (6) have been omitted as being irrelevant to the present proceedings).

PRIVITY OF CONTRACT

[11] Before considering the issues raised in this appeal, there is an important matter which needs to be dealt with at the outset. The learned JC, after having set out provisions in s 96 of the RTA, went on to hold that an intervener could not be allowed to question the acceptance or rejection of the risk under the insurance contract in respect of motorcycle PHS 5512 on the basis of privity of contract. In this connection, we are constrained to take issue with this observation as s 96(3) of the RTA quite clearly provides a right for the injured third party to intervene in any such proceeding and defend his or her rights. So it is not simply a matter between the insurer and the insured as implied by the learned JC.

[12] The rationale for s 96 of the RTA (which is *in pari materia* with the English provision under s 10(3) of the Road Traffic Act 1934 and probably inspired by it) was perhaps best explained by the English Court of Appeal in *Merchants' and Manufacturers, Insurance Co Ltd v Hunt and Others* [1941] 1 All ER 123 wherein Scott LJ stated (at p 125):

> Before I consider the facts of the case, or the relevant terms of the policy, it will be convenient to quote the essential provisions of the Road Traffic Act 1934, upon which the whole appeal turns. Section 10(1) provides as follows:
>
> > ... if a judgment for damages for personal injuries or death is obtained against a person insured by such a policy as is required by sect 36 of the 1930 Act, then, notwithstanding that the insurer may be entitled to avoid the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment the damages, interest and costs awarded.
>
> This proviso thus gives to plaintiffs who obtain judgment in an action for damages caused by the negligent driving or management of a motor car a direct right of action against the insurance company who issued the policy required by the 1930 Act, although the plaintiffs in the negligence action are not party to the policy, and although the policy is voidable at the insurer's instance. From the extreme hardship which might otherwise result from sub-s (1), sub-s (3) gives the insurer a conditional means of escape. If he discovers that he was induced to make the contract of insurance by some material non-disclosure or misrepresentation which, by ordinary insurance law, and not merely by reason of some special stipulation which he has put in his form of policy, entitles him to avoid the contract, he may obtain a declaration to that effect from the court, and he will then be free from the statutory liability to the injured third party. This legislation *was* obviously intended to effect, inter alia, a fair compromise between the two desirable but conflicting objects — namely, on the one hand that of protecting the public from the danger of impecunious tortfeasors on the roads, and on the other hand, that of avoiding the injustice of putting on a wholly innocent and misled insurer the whole pecuniary

A burden of a policy which, neither in law nor in equity, is his policy. However, it would have been unfair to confer this relief unconditionally. There was an obvious danger of the injured party being deprived of the pecuniary safeguard which was the subject of sub-s (1) through the possibility of the policy being avoided in proceedings under the first part of sub-s (3) without his knowledge, and even by B collusion between the insurer and the insured. It was essential that he should have notice of any such action by the insurer, and also that he should be given the right to appear in it and there defend his rights. Both the requisites are met by the proviso to sub-s (3), which in effect creates two conditions precedent to the existence of the insurer's right to get his declaration under the first part of sub-s (3). The third party C gets full notice of the ground of the insurer's claim, and is given an unqualified right to become a party in the insurer's action, and it is particularly to be noted that he is given all the rights of a party to an action without any qualification upon them.

[13] In this context, we note that a declaration obtained under s 96(3) would D amount to a complete defence against any recovery proceedings by the injured third party under s 96(1). It is therefore only fair and logical that the injured third party should not only be added as a party to the insurer's declaration proceedings but also be given every opportunity to defend his or her rights to oppose the application by an insurer without qualification. Citing privity of E contract as a ground to deprive the third party of his right to defend his or her rights, with respect, is misconceived as this is a right provided by statute.

RETROSPECTIVE COVER

F **[14]** Coming now to the issues raised in the appeal, we take first the issue of when does the period of coverage in an insurance policy take effect: is it from the date of cover or from the time of issuance of cover? In the instant case, there is no dispute that at the time of the accident in question, there was no policy of insurance in existence. The policy was issued after the accident.

G

[15] What is however of particular significance is that although the schedule to the policy states the time and date of the policy as '27-10-2011 2.16 pm', the period of insurance is stated as from 27 October 2011 until midnight of 26 October 2012. The same appears in the certificate of insurance H No 017011PFN002610 where the effective date of commencement of insurance was 27 October 2011 and the date of expiry was 26 October 2012. Since only the date of commencement of cover is mentioned without specifying any particular time of commencement, would such a policy cover the time of the accident retrospectively?

I

[16] This issue came up for consideration in *Pacific Orient Insurance Co Bhd v Rosli bin Samsuddin and Ors* (OS No 24–970 of 2011) (unreported), where again the insurance coverage was taken after the accident but on the same day. The insurer similarly took out an originating summons to declare the policy

void and unenforceable. The High Court there dismissed the originating summons and held that the plaintiff as insurer had opted to cover risks commencing from the entire day of 12 October 2009 which took effect from midnight on that day. The court noted that the insurer was bound by its own contract.

[17] Not satisfied with the decision the insurer appealed to this court. The appeal was however dismissed on 6 September 2013. The insurers then sought for leave to appeal to the Federal Court. The application for leave was however dismissed by the Federal Court on 18 February 2014. Interestingly, the leave questions disclosed the very issues sought to be raised in the instant appeal. The questions were:

(a) does a contract of insurance between the insurer and the insured made with reference to the occurrence of a specified event, the occurrence of which is uncertain, remain valid, when the specified event for which the insurance policy was taken, had already occurred, when the contract was entered into between the parties?

(b) when a contract of insurance is entered into between the insurer and the insured, does the contract of insurance still remain valid, when at the time of entering into the contract, there was no longer 'an insurable interest'?

(c) when no time is stipulated in the certificate of insurance as to when the cover begins to run, does time begin to run from midnight of the day the cover was taken, or does time begin to run from the time the cover was taken by payment of a premium?

(d) if no time is stipulated in the certificate, as to when the cover begins to run, does time begin to run from midnight of the day the cover was taken, when the insured, knowing that he had met with an accident, obtains a cover, hours after the occurrence of the accident?

(e) does breach of utmost good faith (*uberimae fides*) on the part of the insured, entitle the insurer to avoid liability to the insured under the certificate of insurance issued to the insured, pursuant to s 96(3) of the Road Transport Act 1987?

(f) were the High Court and the Court of Appeal correct in law in relying on the decision of the Indian authority in *Jaikrishandas vs Chiruthai Ammal and Anr* 1 (1985) ACC 81; AIR [1984] Mad 321? and

(g) in the event that there is a breach of utmost good faith (*uberimae fides*), was the third respondent correct in law in still pursuing his claim against the insurer when the Motor Insurance Bureau of West Malaysia has been specifically set up to cover such cases, where the insurer is not liable?

[18] In another case, *Mohd Faiz bin Zulkifli & Anor v Etiqa Takaful Berhad* [2016] MLJU 254; [2016] 5 CLJ 679, the insurer ('Etiqa Takaful') filed an originating summons at the sessions court seeking that a motor vehicle insurance policy issued by Etiqa Takaful be declared void or unenforceable. The insured motor vehicle registration No PGE 877 was involved in a road accident with a motorcycle owned by a third party. There was a pending civil suit filed by the third parties against the insured in the magistrate's court.

[19] Etiqa Takaful argued that the policy should be declared void or unenforceable as the policy only took effect after payment was received by Etiqa Takaful at 8.27pm on 23 April 2013. Since the accident occurred earlier in the day ie around 10.15am on 23 April 2013, the respondent could not be held liable as the insurer in the policy. It was also argued that the insured person did not disclose to Etiqa Takaful's agent that vehicle PGE 877 was involved in an accident in the morning of 23 April 2013. This non-disclosure of fact had misled Etiqa Takaful's agent into believing that vehicle PGE 877 was free from accident. Hence, the respondent's agent accepted the payment in utmost good faith. The sessions court judge allowed Etiqa Takaful's application. Dissatisfied, the appellants appealed to the High Court.

[20] In allowing the appeal, the High Court held (at the headnotes (CLJ)):

(1) In Etiqa Takaful's document entitled 'The Schedule' and 'Private Car Certificate', it was clearly stated that the insured period was between 23 April 2013 to 22 April 2014. It means that the policy begun at 12 am midnight on 23 April 2013. The fact that the payment for the policy was made at 8.27pm on 23 April 2013 did not determine the period of the policy. In the circumstances, it was clear that the policy would cover the damage of the vehicle caused in the accident as well as a third party risks claim.

(2) Etiqa Takaful's agent ought to make an inquiry because he would have known that the insured period will include a past period. In this instant case, Etiqa Takaful's agent took upon himself that everything was alright and accepted the payment without enquiring whether the vehicle to be insured had met any accident earlier in the day. In the event the insured person did not disclose the true facts to the agent when asked, then it would tantamount to fraud which would be sufficient to render the policy void. If Etiqa Takaful's agent had asked, he would have discharged his responsibility. The omission is a waiver of right to information. Therefore, the principle of utmost good faith could not be applied.

(3) Insurance is a contract upon speculation ..., 'speculation' refers to something which is not known to be a fact. In this instant case, an accident involving vehicle PGE 877 in the morning of 23 April 2013 is a fact. Etiqa Takaful could have easily discovered this fact. But, Etiqa Takaful accepted

the premium and took the risk which could have been easily avoided. Therefore, Etiqa Takaful could not now disclaim any liability for its own carelessness or omission.

(4) The intention of Parliament is to ensure a party who suffers injury and damage to his property will be compensated through an insurance company against the party who is at fault. An insurance company plays an important role in this social organisation. To shield behind s 96(3) of the Road Transport Act 1987 from liability to a third party risks claim is against the spirit of the intention of Parliament. Etiqa Takaful should not be protected under s 96(3) of the Road Transport Act 1987 for its own omission or carelessness which is tantamount to a waiver of information, Etiqa Takaful's also could not rely on the principle of utmost good faith.

[21] The insurer, Etiqa Takaful, appealed to this court against this decision. The appeal was heard and dismissed on 13 October 2016.

[22] In *Etiqa Takaful Berhad v Rorki Dusong & Ors* [2016] MLJU 257; [2016] 2 AMCR 71, a similar issue arose. The issue was again whether an insurance policy could cover the accident period in a situation where the said policy was purchased after the accident had occurred. The High Court dismissed the insurer's application to declare the policy null and void on similar grounds as decided in the earlier two cases. The appeal to this court was also unsuccessful as it was dismissed on 18 January 2017.

[23] The decisions as aforementioned were undoubtedly influenced by case law from India. The Indian courts have been consistent in deciding the effective date or time of commencement of a policy of insurance. If the policy in question provides a specific time to be operative, then the policy becomes effective from that time. If the policy merely provides a date without reference to any time, then the policy becomes effective from midnight on that particular date (see *New India Assurance Co Ltd vs Ram Dayal and Ors* 1990 SCC (2) 680; *National Insurance Co Ltd v Dakhi and Ors* [1990] ACJ 827; *Oriental Insurance Co Ltd v Shri Prakash and Ors* [1993] ACJ 1085; *Maya Devi and Ors v Hoob Raj and Ors* I (1987) ACC 33; *V Srinivasan v Rajalakshmi* AIR 1975 Mad 263 and *Jaikrishandas vs Chiruthai Ammal and Anr* 1 (1985) ACC 81; AIR [1984] Mad 321).

[24] The position in the United Kingdom is similar. In *Cartwright v MacCormack (Trafalgar Insurance Co Ltd Third Parties)* [1963] 1 All ER 11 ('Cartwright'), the English Court of Appeal held that when a policy of insurance provided that it was to commence from a specified date, the duration of the policy was to be calculated from midnight of the day in question (see also Poh Chu Chai, *Law of Insurance* (3rd Ed) at p 207).

A **[25]** In the *Cartwright* case, a temporary cover note providing coverage for the defendant's motor car stated that the cover was for 15 days from the date of commencement of the policy, namely, 2 December 1959. The cover note also stated that the time for commencement of risk was from 11.45am on the same day. On 17 December 1959, at about 5.45pm, the insured car was involved in an accident whereby the plaintiff recovered damages from the defendant. The insurers denied liability on the ground that the cover note had expired at the time of accident.

C **[26]** In dismissing the insurer's contention, Their Lordships decided that there was a distinction to be drawn between the time of commencement of the risk insured and the date of commencement of the policy. In this regard, Harman LJ observed (at p 13):

> D The question of course is, when do the 15 days start to run. The insurance company argued that it started at 11.45am on December 2, and therefore expired at the same time on December 17, several hours before the accident occurred. For the defendant it was argued that time did not begin to run till midnight on December 2, and was, therefore, still current at the time of the accident ... The duration of the insurance company's liability is expressed as 15 days from the commencement of risk. The risk runs, as we know, from 11.45 am, but the date of commencement is December 2. E The policy, therefore, expires 15 days from December 2, and these words, in my judgment, on the ordinary rules of construction exclude the first date and begin at midnight on the day ... These cases seem to show that, generally speaking, when a day is mentioned from which time is to start running, fractions of a day ought to be disregarded and time should run from midnight. In my judgment, in the present F case the words 'date of commencement' or (which is the same thing) 'commencement date' here used are synonymous with day of commencement, and not time of commencement, and therefore the 15 days are to be calculated from midnight on the commencement date.

G **[27]** Reverting to the instant case, and as alluded to earlier, although the schedule to the policy states the time and date of the policy as '27-10-2011 2.16pm', the period of insurance is stated as from 27 October 2011 until midnight of 26 October 2012. The same appears in the certificate of insurance No 017011PFN002610 where the effective date of commencement of H insurance was 27 October 2011 and the date of expiry was 26 October 2012. Since only the date of commencement of cover is mentioned without specifying any particular time of commencement, we agree that the policy becomes effective when the date comes into existence at midnight and not when the policy was issued.

I **[28]** We should add that this is purely a question of construction of the relevant clauses in the policy. It was open to the insurer to have stipulated that the policy becomes effective from the time it was issued but this was not the case here. By the terms of its own contract, the policy has become effective

retrospectively in the sense that coverage began at midnight on 27 October 2011 and would therefore include the period when the accident occurred.

NO INSURABLE INTEREST

[29] The respondent however contended, as a related issue, that there was no insurable interest at the time the policy was taken out citing in support the case of *Medical Defence Union Ltd v Department of Trade* [1980] Ch 82 where Megarry V-C said:

> First, the contract must provide that the assured will become entitled to something on the occurrence of some event ... Second, the event must be one which involves some element of uncertainty ... Third, the assured must have an insurable interest in the subject matter of the contract.

[30] It was asserted that the insurable interest was not present in the present case when the accident took place because no cover was in existence when the accident occurred. The policy was only meant to cover events after the issuance of the policy. This, in our view, was another way of asking the same question of whether a policy, which was not in existence at the time of accident, and issued by the insurer only after the accident, can retrospectively by its terms cover the date of accident.

[31] In this respect, the Privy Council in *Motor & General Insurance Co Ltd and Dorothy Cox and Another* [1990] 1 WLR 1443 held that such a policy is valid and effective under the law. The Privy Council unanimously held that there is nothing wrong for a policy to retrospectively cover the time of accident even though at the time of accident no policy of insurance was ever in existence.

[32] In that case, the plaintiff was injured by a motor vehicle whose insurance had expired at the time of accident. The insurer subsequently issued an insurance certificate which was backdated to cover the time of accident. The plaintiff obtained judgment against the driver of the motor vehicle. The insurer refused to satisfy the judgment under s 9(1) of the Motor Vehicles Insurance Act (Barbados) which is materially in pari materia with our s 96(1) of the RTA.

[33] The insurers argued before the Privy Council there was no effective policy in existence at the time of accident as under s 4(7) of the Motor Vehicles Insurance Act (Barbados), a policy could not be retrospective in its operation. That s 4(7), which is in pari materia with our s 91(4) of the RTA, provided as follows:

> A policy shall be of no effect for the purposes of this Act unless and until there is issued by the insurer in favour of the person by whom the policy is effected a certificate (hereinafter referred to as a certificate of insurance) in the prescribed form

A and containing such particulars of any conditions subject to which the policy is issued and of any other matters as may be prescribed, and different forms and different particulars may be prescribed in relation to different cases or circumstances.

B **[34]** The Privy Council rejected this argument and went on to hold that under s 9(1) (corresponding to s 96(1) of the RTA), so long as the certificate of insurance retrospectively covered such liability, it was immaterial that the policy had come into existence after the liability was incurred. The insurer was therefore liable to satisfy the judgment obtained. In other words, if the policy C retrospectively covers such an accident, it satisfies the requirements of s 9(1). The reasoning of the Privy Council was as follows (at p 1446):

> The question then is whether section 4(7) has any effect on section 9(1). Although the former subsection provides that a policy shall be of no effect for the purposes of the Act unless and until there has been issued a certificate in the prescribed form, it D provides neither that a policy cannot have effect at common law without the issue of a certificate nor that, having become effective, it cannot operate retrospectively. If section 4(7) had the effect contended for by the insurer, it would mean that, although the insured could enforce his rights against the insurer notwithstanding the absence of a certificate, as well as rights which were retrospectively conferred, E third parties, for whose benefit section 9(1) was enacted, would be debarred from so doing. This would be a very curious result. Their Lordships are satisfied that the insurer's argument is without substance and that there is nothing in section 4(7) which requires that the operation of section 9(1) be limited to cases where there was in existence at the date when liability was incurred a policy which satisfied the F requirements of the former subsection.

[35] It can therefore be surmised that a policy of insurance is valid and effective under s 96(1) of the RTA even though at the time of the accident there was no contract of insurance in existence, and that the policy was only issued G subsequently to cover the time of accident.

BREACH OF UTMOST GOOD FAITH

[36] The final issue was the one which was upheld by the High Court in H favour of the insurer in the present case. Apart from holding that the insurer cannot be held liable for an accident which occurred prior to the issuance of the policy, the High Court also held that the insured had the intention to defraud the insurer with regard to issuing a policy covering the time of the accident.

I **[37]** Learned counsel for the plaintiff, however, fashioned his arguments in this context rather differently in that he relied on the fundamental rule governing contracts of insurance which is that a purchaser of a policy must come clean with all the facts within his knowledge to the insurer so as to avoid breach of utmost good faith (*uberrima fides*) (see *Rozanes v Bowen* (1928) 32

Lloyd's Rep 98). This is also a mandatory requirement by statute in the form of s 150(1) of the Insurance Act 1996 which requires the insured to make full disclosure of all relevant matters. It was submitted that the insured was in clear breach of *uberrima fides*.

[38] In this regard, it must be noted that although the insured was guilty of breach of utmost good faith, the intervener was an innocent third party. As motor insurance is compulsory by law, the intention of Parliament is to provide compensation by insurance companies especially to innocent and blameless third parties who suffer injury and damage. It is a statutory remedy and there must be some assurance of payment as otherwise the whole purpose of such an insurance scheme will seem illusory.

[39] This was fortified further by the establishment of the Motor Insurers' Bureau of Malaysia ('MIB') in 1968 as a form of social justice to victims of road accidents who failed to obtain compensation. It was set up on 15 January 1968 through an agreement between MIB and the Minister of Transport and followed by an agreement by each of the insurance companies transacting compulsory vehicle insurance business who would fund the MIB.

[40] This was superseded by a new agreement between MIB and The Minister of Transport on 9 January 1992 which was followed by a second agreement between MIB and the insurance companies which became operative on 1 January 1992. The Malaysian MIB Agreement, which was inspired by and fashioned according to the UK MIB Agreement of 1946, later spawned the Singapore MIB Agreement of 1975 (see S Santhana Dass, *The Law of Motor Insurance* (2010) Marsden Law Book, Kuala Lumpur).

[41] Significantly, the MIB agreement also found its way into the statute books in the form of s 89 of the RTA which defines 'authorized insurer' as 'a person lawfully carrying on motor vehicle business in Malaysia who is a member of the Motor Insurers' Bureau'. In the same section it is also set out that 'Motor Insurers' Bureau' means the Motor Insurers' Bureau which has executed an agreement with the Minister of Transport to secure compensation to third party victims of road accidents in cases where such victims are denied compensation by the absence of insurance or of effective insurance.

[42] One of the key aspects of the MIB agreement is the provision for the insurer to satisfy any judgment in respect of liability insured under compulsory insurance legislation. In this respect, cl 3(a) of the MIB agreement provides:

> If a judgment is obtained in Malaysia against any person (hereinafter referred to as the 'Judgement Debtor') in respect of liability required to be insured by the Compulsory Insurance Legislation the Insurer Concerned will satisfy the Original

Judgement Creditor if and to the extent that the Judgement has not been satisfied by the Judgement Debtor within twenty-eight days is entitled to enforce it.

[43] So, who is the 'insurer concerned'? The definition of 'insurer concerned' can be found in cl 1 of the agreement which reads:

> *'Insurer concerned' means that Insurer who at the time of the accident which gave rise to a liability required to be insured by the Compulsory Insurance Legislation was providing an insurance against such liability in respect of the vehicle arising out of the use of which the liability of the Judgement Debtor was incurred. An Insurer is concerned within the meaning of this Agreement notwithstanding that —*
>
> (i) the insurance *was* arranged after the accident but purported to be effective at the time of the accident;
>
> (ii) the insurance has been obtained by fraud, misrepresentation, non-disclosure of material facts or mistake ... (the rest of the definition excluded for being irrelevant to the present appeal)

[44] It is significant from the definition above that the insurance company which issued the policy remains the insurer concerned notwithstanding that the insurance was arranged after the accident but purported to be effective at the time of accident and notwithstanding that the insurance was obtained by fraud, misrepresentation, non-disclosure of material facts or mistake (see also *Mohd Salleh Kasim v Taisho Marine & Fire Insurance Co Ltd & Anor* [1998] MLJU 665; [1999] 5 CLJ 302).

[45] The question that can arise from this arrangement is whether it is the insurer concerned or MIB which needs to satisfy a judgment obtained by an injured plaintiff. In this context, learned counsel for the respondent in the present appeal had indicated that the intervener should look to MIB for a remedy.

[46] This question arose for consideration in the Singapore case of *Pacific & Orient Insurance Co Bhd (formerly known as Pacific & Orient Insurance Co Sdn Bhd) v Motor Insurers' Bureau of Singapore* [2013] 1 SLR 341; [2012] SGHC 202 where an injured pillion rider of a motorcycle obtained judgment against the rider of the said motorcycle and sought to enforce judgment against the insurer of the said motorcycle and MIB.

[47] The insurer in that case (P&O Insurance) disclaimed liability as no insurance cover was taken for the pillion by the rider of the motorcycle. Not surprisingly, MIB took the stand that P&O Insurance should settle the judgment as it was the 'insurer concerned' having issued the policy in respect of the said motorcycle. This was refuted by P&O Insurance as it did not provide cover for the pillion.

[48] In arriving at its decision, the High Court of Singapore alluded to the relevant history of the MIB and the rationale for its existence as well as the various clauses of the agreement between the insurance companies and MIB which agreement was known as the special agreement. In giving judgment in favour of MIB, which decision was upheld by the Singapore Court of Appeal on 29 April 2013, the court noted:

> 34. It cannot matter that Insurer and its policy did not cover passenger or pillion rider liability because that was the whole purpose and rationale for such a scheme, ie where there was no effective insurance cover, the victim was assured of compensation and that was dealt with by the Insurer who issued the motor policy.
>
> The definition of 'Insurer Concerned' also makes clear by elaboration, that the insurance company which issued the policy to the judgment debtor remains an 'Insurer Concerned'. This was notwithstanding that, for example, the insurance was obtained by fraud, misrepresentation, non-disclosure of material facts, mistake, or that there was some term, description, limitation, exception or condition of the insurance policy or of the proposal form on which it was based expressly or by implication excludes the insurer's liability whether generally or in the particular circumstances in which the judgment debtor liability was incurred, or even in the situation where the judgment debtor was in unauthorised possession of the vehicle by which liability incurred on the part of the judgment debtor arose.

[49] In the same context as well, eminent author S Santhana Dass in his recent article entitled 'Backdated Covernotes and the Insurers' Liability under s 96 of the Road Transport Act 1987' [2017] 1 LNS (A) xi opined that the MIB domestic agreement dated 1 January 1992 has tied the hands of the insurers with the wide encompassing definition of 'insurer concerned'. In this respect, we are in agreement with the learned author that, in the circumstances, the issue of non-disclosure or breach of duty of utmost good faith cannot succeed and liability of the insurer is apparent.

[50] In the upshot, the order of the High Court in effectively repudiating liability in respect of all claims arising out of the accident that occurred on 27 October 2011 cannot be sustained. The plaintiff/insurer was the 'insurer concerned' under the domestic MIB agreement and was therefore still liable to third parties, including the intervener, for any claims arising out of the said road accident. It must follow that the plaintiff/insurer, by entering into the MIB agreement, had effectively waived their right to seek for such orders from the court under s 96(3) of the RTA. The remedy for the insurer then was to seek recovery against the insured for any such monies paid out by them.

[51] In view of the position as we have set out, it may perhaps be timely for the legislature to reconsider s 96(3) of the RTA which appears to be out of step with the arrangements settled in the MIB agreement. In order to take into account the provisions of the MIB agreement, which as mentioned before are

A binding on all motor insurers, some form of amendment to this provision is imperative to acknowledge the purpose and objectives of the said arrangement. This would also be in keeping with the standard term in all third party insurance policies which is that the insurer will honour the MIB agreement. Having agreed to be bound as such, it would be unconscionable for the insurer
B in such a case to seek declarations from the court to bar innocent third parties from enforcing their claims.

[52] In this aspect as well, it is pertinent that Part IV of the RTA, and in particular s 96, was specifically enacted to protect and provide compensation to
C third party victims of road accidents. It is therefore most unfortunate that s 96(3) of the RTA, and the way it has been interpreted in a number of cases, has taken away this protection thus defeating the whole purpose of the statute as a piece of social legislation. Needless to add, this further underscores the need for a review to avoid any further confusion or controversy and especially
D prejudice to third party victims of road accidents.

CONCLUSION

[53] In the circumstances, and for the reasons stated, we are constrained to
E hold that the learned JC was plainly wrong in allowing the declarations sought by the plaintiff. Accordingly, we allow the appeal and set aside the orders of the High Court with costs to the appellant here and below. Order accordingly.

F *Appeal allowed; orders of High Court set aside with costs to appellant here and below.*

Reported by Nisha Paran

G

H

I